

November 16, 1998

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THE ROSE FOUNDATION

US Fish & Wildlife Service
CCFWS, Arcata, CA

For Communities & The Environment
Jill Ratner, President



Bruce Halstead
U.S. Fish and Wildlife Service
1125 16th Street, Room 209
Arcata, CA 95521

**RE: Pacific Lumber Draft Habitat Conservation Plan/Sustained Yield Plan and
Draft Environmental Impact Statement/Environmental Impact Report**

Dear Mr. Halstead,

We believe that the federal Endangered Species Act (ESA) precludes issuance of an Incidental Take Permit (ITP) to the Pacific Lumber Company (PL) and its subsidiaries, Scotia Pacific Holding Company and Salmon Creek Corporation, based on Pacific Lumber's Draft Habitat Conservation Plan/Sustained Yield Plan (HCP/SYP) without incorporation of additional mitigation measures, because, as submitted, the draft HCP/SYP fails to minimize and mitigate the proposed taking to the maximum extent practicable.

We further believe that state law precludes approval of the Draft Sustained Yield Plan without incorporation of additional mitigation measures, because the draft HCP/SYP, as submitted, fails to demonstrate the infeasibility of the alternative identified in the associated Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) as the "Environmentally Superior Alternative" and because, as submitted, the draft HCP/SYP fails to incorporate feasible mitigation measures which would substantially lessen significant environmental effects of the project.

We further believe that federal law may preclude issuance of an ITP to Pacific Lumber Company, even if additional mitigations were provided, under Code of Federal Regulations (50 CFR 13.21) which states: "Upon receipt of a properly executed application for a permit, the Director shall issue the appropriate permit unless: 1) the applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, if such assessment or conviction evidences a lack of responsibility."

In the event that the decision is made to issue an ITP over these objections, please notify us and provide an explanation of that decision 10 days prior to issuance of the ITP

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Federal law may preclude issuance of an ITP to Pacific Lumber Company because the applicant has been assessed civil penalties relating to the activity for which the application is filed, evidencing a lack of responsibility.

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Code of Federal Regulations (50 CFR 13.21) which states: "Upon receipt of a properly executed application for a permit, the Director shall issue the appropriate permit unless: 1) the applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, if such assessment or conviction evidences a lack of responsibility."

In the past three years, Pacific Lumber has been cited for over 300 violations. Most of these violations relate to logging practices that increase sedimentation, water temperature or other impacts on watercourses, with serious implications for aquatic species. These violations in themselves call into question the company's responsibility, particularly in respect to the impact of its operations on aquatic species.

Most recently, the California Department of Forestry suspended Pacific Lumber's timber operator's license for the remainder of calendar year 1998, in response to several egregious violations of forestry regulations. CDF also indicated that PL might not receive a timber operator's license in 1999. As a threshold question, it must be determined whether it is possible for the relevant agencies to approve an ITP that allows incidental take of species through logging, and approve SYP for logging operations, if the applicant lacks a timber operator's license.

CDF suspended PL's license after a logging company under contract to Pacific Lumber was cited for several violations, including first, failing to selectively harvest in a manner consistent with legally mandated streamside buffers, and instead clearcutting all the way to a stream, and second, running equipment across a stream course rather than building an appropriate road with culvert.

The CDF decision to suspend PL's license, however, appeared to rest on Pacific Lumber's own actions, first in directing the contractor to disregard necessary stream protections, and second, in covering up the violations until logs could be hauled to the mill, allowing the company to improperly profit from the violation. After delaying any report of the incident, PL's report fixed responsibility entirely on the contractor, without any acknowledgment a company role in the violation.

This apparent dishonesty and failure to accurately report the incident is of particular concern in evaluating PL's likely responsibility in carrying out the largely self-policed restrictions of any HCP, and especially an HCP that is designed to protect aquatic species. It raises questions about PL's future veracity in reporting on various measures crucial to monitoring the HCP/SYP such as water temperatures critical to the survival of aquatic species, and survey data for spotted owls and murrelets.

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In the event that any ITP is issued, despite the concerns referenced above, it is critical that independent agencies provide outside monitoring of all criteria relevant to evaluating the effectiveness of the HCP/SYP's mitigation's. While it is only fair that the applicant reimburse the cost of such monitoring, it is critical that those performing the monitoring be effectively insulated from any potential pressure by the applicant, to the extent that monitoring personnel should, perhaps, be made available by the agencies for a short time on some sort of rotating basis to avoid formation of relationships which might cloud the monitor's view of his or her responsibility, and that payment for monitoring services be completely unrelated to any findings of the monitor, including findings that additional mitigations might be required, and similarly that payment for monitoring services must be unrelated to Pacific Lumber's continued ability to log under any ITP.

Furthermore, if the PL did, in fact, misrepresent its role in the incident and cover up the incident until it could improperly secure the financial benefits of misconduct, this lack of veracity itself raises questions about the veracity of data upon which the HCP/SYP rests. This suggests that all data and analysis provided by Pacific Lumber are open to question unless independently substantiated and must be subject to intense scrutiny.

In the event that it is determined that Federal law allows issuance of an ITP to Pacific Lumber, the project as described draft HCP/SYP fails to minimize and mitigate the proposed taking and other significant environmental impacts to the maximum extent practicable or feasible.

Federal law requires that the impacts of proposed taking of endangered species be minimized and mitigated to maximum extent practicable (p1-8 Draft EIS/EIR). California state law requires that CDF not approve a project as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of the project (Draft EIS/EIR, p. 1-10)

Generally, "practicable" and "feasible" mean two things: first, that mitigations are possible using currently available technology, and second, that the mitigations are not so costly that they would make it impossible for the applicant to continue to continue to do business.

In this instance, it may be informative to consider is what additional mitigation would be feasible or practicable if the company were to reduce its debt, and therefore reduce its cash-flow requirements by using part or all of the money paid for property transferred under the 1996 Headwaters Agreement, and under California S.B. 1986, to pay off some of its recent bond issues. Our analysis suggests that if \$380 million were applied to reducing Pacific Lumber subsidiary

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Scotia Pacific LLC debt, more than \$172 million in interest would be saved in the first decade, significantly reducing the cash flow demands on Pacific Lumber operations. Similarly, if \$480 million were applied to reducing this debt, more than \$238 million in interest would be saved in the first decade, reducing cash flow demands even further. (Actual reduction in cash flow requirements would be even greater, since substantial principal payments would be made up front, subsequent principal payments would be substantially reduced). In the alternative, if the proceeds of these transactions were used to buy additional forest lands, the company's cash flow requirements would be distributed over a larger land base, allowing for significantly less intensive harvesting of any given area to meet cash flow requirements.

In the end, however, it is the applicant's responsibility to demonstrate that additional mitigations, if useful, are impracticable or infeasible.¹ The draft documents fail to do so.

In its analysis of alternatives, the Draft EIS/EIR finds that an environmentally preferable alternative exists. That alternative provides for large riparian buffer zones, very limited logging of old-growth, and selective logging throughout Pacific Lumber's timber lands. That alternative is rejected without any clear demonstration that it is not feasible.

In fact, the various documents include only one attempt at the analysis of financial impacts of mitigation measures. This analysis, found at Part III, Section D, is dated October, 1997 and appears to analyze the costs of various streamside mitigation measures, which do not appear to correspond to the alternatives currently under consideration. Not only do the draft HCP/SYP-EIS/EIR documents lack any updates to this analysis that would facilitate consideration of the practicability of additional mitigations beyond those included in the project as currently proposed, the documents also fail to respond in any way to issues concerning the methodology of this analysis that were raised by the California Department of Forestry and Fire Prevention and the United States Environmental Protection Agency in communications with the applicant back in 1997.

¹ Requiring applicants to seriously consider the practicability of feasibility of additional mitigations challenges applicants to explore options that they might otherwise ignore, with value for shareholders as well as on the environment. A study prepared for the Office of Policy Analysis and Review, Office of Air and Radiation, US EPA, September 1995, discusses the "Porter Hypothesis" (Michael) which holds that once firms are motivated to seek innovative solutions to environmental problems, whether by regulations or other pressures, they may find previously overlooked cost-saving opportunities to improve processes, reduce wastes, or redesign products, thus wringing inefficiencies out of the production process... In this way, regulations can actually improve economic competitiveness leading to the possibility that firms with superior environmental performance also achieve superior profitability."

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Aquatic Species

The Pacific Lumber HCP/SYP and associated EIS/EIR acknowledge that Pacific Lumber's logging roads are important sources of sediment which negatively impacts habitat for coho salmon, a species federally listed as threatened. Earlier reductions in negative impacts could be obtained if the applicant were to speed up its projected program to resurface, improve and remove or relocate logging roads. We believe that acceleration of the road improvement program would contribute toward mitigating the take allowed under any ITP for aquatic species. The documents do not explain why accelerating the road improvements is impracticable or infeasible.

Many members of the public and public interest organizations have suggested that no cut buffers of at least one site potential tree height are needed along streams to reduce sedimentation, avoid increased water temperatures lethal to aquatic species and other logging and impacts on aquatic habitat. Studies prepared by the National Marine Fisheries Service in preparation for release of Take Avoidance Guidelines suggest that a stream side no-cut buffer of at least one site potential tree height is required to avoid take of coho salmon. We believe that streamside no cut buffers of one site potential tree height could contribute toward mitigating the take permitted under any ITP for aquatic species, and could also contribute toward mitigating other significant environmental impacts of the SYP, including general impacts to water clarity and quality. The documents do not explain why it is impracticable or infeasible to establish no-cut zones of one site potential tree height.

The documents acknowledge that mass wasting (slope failure or landslide) is an important source of sediment in streams, threatening water quality and aquatic habitat. Mass wasting also poses threats to the safety of communities adjoining Pacific Lumber property. Members of the public and public interest organizations have suggested that all road building and logging operations should be prohibited on slopes with high, very high or extreme risk of mass wasting. We believe that this would contribute to mitigating the impact of any take permitted under an aquatic ITP and other environmental impacts of the project. The feasibility and practicability of this mitigation is not addressed in the draft documents, nor is there any information to allow independent analysis of their practicability or feasibility.

Although a relatively small percentage of Pacific Lumber property is identified as posing high, very high or extreme risk of mass wasting (see attached table from prior draft PL EIS/EIR), currently a large proportion of Pacific Lumber's Timber Harvest Plans involve operations on slopes with high, very high or extreme risk of mass wasting. This factor has significantly slowed review and approval of Pacific Lumber THPs, because NMFS has required Pacific Lumber to provide acceptable geological evidence that such operations will not increase the risk of mass wasting. This is particularly important because Maxxam, in reporting

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substantially reduced third quarter earnings compared to last year, noted: "Third quarter lumber shipments were lower due in part to a diminished supply of approved timber harvest plans combined with regulatory and judicial restrictions on logging operations, which have affected the company's ability to produce a desirable volume and mix of products." These reduced earnings do not, however, truly suggest that mitigations reducing or eliminating operations on high and very high risk slopes are impracticable. It appears Pacific Lumber made little if any apparent effort to reconfigure its plans to avoid the areas of concern. An applicant's reluctance to accommodate regulatory and judicial restrictions reflects poor planning, not impracticability or infeasibility.

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It may be possible that in the long run, best available science will demonstrate that some logging is possible on slopes with high or very high risk without adding to risk of mass wasting. If so, it may be possible, while prohibiting road building in such areas, to permit limited logging which does not require the use of equipment on the ground, either through cable logging or helicopter logging on such slopes, limiting such logging to require retention of trees sufficient to retain 75% of the living root structure (or canopy if root structure cannot be calculated) of the trees initially present on slopes with very high risk of mass wasting and retention of 50% of the living root structure (or canopy) of the trees initially present in areas that pose high risk of mass wasting. The feasibility and practicability of these mitigation are not addressed in the draft documents, nor is information provided to allow their analysis.

Murrelet & Owl

Acceptance of the Pacific Lumber HCP as submitted and issuance of an ITP based upon it will result in the taking of approximately 251-340 marbled murrelets which are federally listed as a threatened species. This represents the loss of 17-23% of the local population, much of which loss is concentrated within a fairly short period of time, since the plan provides for intensive logging of old growth available for harvest within the first two decades.

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The effect of mitigations provided in the plan, are however, likely to be delayed for a substantial period of time, and are likely to provide little benefit to the species if its decline, as many experts suggest, is too rapid to take advantage of them. Planned mitigations for the take of murrelets focus on recruitment of additional high quality habitat through the creation of Marbled Murrelet Conservation Areas that incorporate substantial amounts low quality occupied habitat in residual old growth and unoccupied or unsurveyed potential habitat in residual old growth as well as second growth areas, adjacent to high quality occupied habitat in the form of unentered old growth stands.

We believe that it may be possible, if the best available peer reviewed science supports any take of murrelets at all as consistent with the survival and recovery of the species, to contribute to mitigation of the impacts of the take by reinstating

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seasonal operation restrictions in occupied areas and areas within reasonable buffer distance from occupied stands, by significantly reducing the amount of occupied old growth available for logging, and by eliminating any clearcutting of occupied habitat.

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Environmentally Superior Alternative

We believe that the environmentally superior alternative provides the best project option of those analyzed and the best mitigation for impacts discussed above when combined with 1) appropriate limitations on equipment use, particularly limits on equipment use and logging on slopes with high, high risk and extreme risk of mass wasting and 2) improved monitoring and enforcement.

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We understand that the documents indicate that the government cannot compel this alternative. Even if that is so, it may be in the applicant's best interest to adopt the alternative. We believe that the Environmentally Superior Alternative is the only alternative likely to end the controversy and litigation that has surrounded Pacific Lumber's operations since Maxxam acquired the company in the mid-1980s,

which
we are
not
convinced
accurately
reflects
current
law,

In a 1996 empirical analysis of more than 300 of the largest public companies in the U.S., researchers Stanley, Soyka & Ameer of ICF Kaiser International, Inc., concluded that investments in environmental management and improved performance can be justified, in many cases, on purely financial grounds, because better environmental performance reduces the risk associated with corporate operations and therefore reduces the cost of financing the company's activities. Interestingly, the researchers write: "Our results show that firms will increase shareholder value if they make environmental investments that go beyond strict regulatory compliance (pp. 1-2) (emphasis added)."

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Corporate compliance with the law is also important to shareholders because it decreases litigation. In a paper entitled "Investor Responsibility Research Center Report: *Environmental and Financial Performance: Are They Related?*", by Mark A. Cohen, Scott A. Fenn and Jonathan S. Naimon, April 1995: the researchers noted: "Firms with a relatively large number of environmental lawsuits as compared to their industry cohorts were found to earn a lower level of return on assets and return on equity." Clearly, there are any number of people and organizations who stand ready to sue Maxxam and Pacific Lumber if this project is approved in a form or manner that violates the law.

The Rose Foundation for Communities and the Environment is a non-profit public charity dedicated to advancing positive intersections of the environment and the economy.

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For five years, the Foundation has been involved in the effort to preserve and restore the coastal redwood eco-system. For much of that time we have focused our efforts on promoting a "debt-for-nature" settlement in which Maxxam, Inc, Pacific Lumber Company's corporate parent, would transfer environmentally critical properties in the Headwaters Forest area to the federal government as compensation for, and in settlement of, Maxxam's potential liabilities to the federal government resulting from the failure and \$1.6 billion taxpayer bailout of a Texas savings and loan which federal regulators claim Maxxam controlled.

The Foundation is also shareholder in Pacific Lumber's parent company, Maxxam, Inc. For the past three years the Foundation has actively sought to improve Maxxam's value as an investment by encouraging other Maxxam shareholders to join us in advocating a debt-for-nature settlement. We have also worked with other shareholders to urge Maxxam management to improve Maxxam/Pacific Lumber's environmental practices, which we firmly believe to be in the best interest of all Maxxam shareholders.

Thank you for your consideration. We will await, with interest, the decision regarding permitting of this project.

Sincerely,



Jill Ratner, President
Rose Foundation for Communities and
the Environment

